

United STATES District Court

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DEBRA P. HACKETT, CLK
U.S. DISTRICT COURT
MIDDLE DISTRICT ALA

TIMOMTY LEE SUNDAY AIS 213453
EASTERLING CORRECTIONAL FACILITY
200 WALLACE DRIVE
CLIO AL 36017-2613

CASE 3:07cv723

TIMOTHY LEE SUNDAY , 213453,

PETITIONER,

V.

LEE COUNTY CIRCUIT COURT, et al.,

respondents.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

TIMOTHY LEE SUNDAY , PETITIONER V. GWENDOLYN MOSELY, WARDEN
EASTERLING CORRECTIONAL CENTER:

ON RULE 60 b MOTION TO THE COURT OF APPEALS FOR
THE WRIT OF HABEAS CORPUS

FACTS

COUNT ONE :

THE STATE OF ALABAMA, LEE COUNTY CIRCUIT COURT, FALL
TERM, 1998 ; the grand jury of said county charge that
before the finding of this Indictment CC98-1095 TIMOTHY
LEE SUNDAY, ALIAS TIMMY SUNDAY , WHOSE TRUE CHRISTIAN NAME
IS OTHERWISE UNKNOWN TO THE GRAND JURY, DID ENGAGE
IN SEXUAL INTERCOURSE WITH CYNTHIA DAWN THROWER, A FEMALE,
WHOS WAS INCAPABLE OF CONSENT BY REASON OF BEING PHYSIC-
ALLY HELPLESS OR MENTALLY INCAPACITATED, IN VIOLATION
OF § 13 A-6-61 OF THE CODE OF ALABAMA,

COUNT II:

**AND THE GRAND JURY FURTHER CHARGE THAT BEFORE THE
FINDING** OF THIS INDICTMENT CC 98- 1095,01 TIMOTHY LEE SUNDAY,
ALIAS TIMMY SUNDAY, WHOSE TRUE CHRISTIAN NAME IS OTHERWISE
UNKNOWN TO THE GRAND JURY, A MALE, DID ENGAGE IN SEXUAL
INTERCOURSE WITH CYNTHIA DAWN THROWER, A FEMALE, BY FORCIB-
LE COMPULSION, IN VIOLATION OF § 13 A-6-61 OF THE CODE
OF ALABAMA.

CONTRARY TO RESPONDENTS RECOMMENDATION. IN THE PRIOR HABEAS ACTION, THIS COURT DENIED [SUNDAY] RELIEF FROM HIS SEXUAL ABUSE CONVICTION WITHOUT REVIEWING THE MERITS OF PETITIONERS CLAIMS. CLEARLY ESTABLISHED LAW PROVIDES THE RELIEF REQUESTED. 28 USCS § 2244; THE AMENDMENT^T PROPOSED TO MODIFY THIS PROVISION SO THAT, WHILE A JUDGE NEED NOT ENTERTAIN SUCH A LATER APPLICATION FOR THE WRIT UNDER SUCH CIRCUMSTANCES, HE IS NOT PROHIBITED FROM DOING SO IF IN HIS DISCRETION HE THINKS THE ENDS OF JUSTICE REQUIRE ITS CONSIDERATION. IN VIEW OF THE AMENDMENT WHICH WILL PERMIT A SECOND APPLICATION TO BE CONSIDERED WHEN THE ENDS OF JUSTICE REQUIRE IT, THE ORIGINAL PROVISION OF THE SECTION, AUTHORIZING THE JUDGE WHO HEARD THE ORIGINAL APPLICATION TO GRANT A REHEARING THEREOF, IS OMITTED BY THE AMENDMENT AS UNNECESSARY. ACCORDINGLY THE REFERENCE TO REHEARING IN THE CATCH LINE OF THE SECTION IS OMITTED. "A CLAIM CONTAINED IN A STATE PRISONERS SUCCESSIVE PETITION THAT WAS PRESENTED IN A PRIOR PETITION "SHALL BE DISMISSED." 28 USCS § 2244(b)(1). HOWEVER, THIS APPLIES ONLY TO CLAIMS THAT WERE DISPOSED ON THE MERITS. SLACK V. McDANIEL, 529 U.S. 473, 146 L.Ed. 2d 542, 120 S Ct. 1595 (2000). NEVER THE LESS, SUPREME COURT REVIEW OF A SUCCESSIVE PETITION MAY STILL AVAILABLE BECAUSE THE SUCCESSIVE PETITION CAN BE FILED AS AN ORIGINAL PETITION IN THE SUPREME COURT, UNDER 28 USCS § 2241(a). FELKER V. TURPIN, 518 U.S. 651, 135 L. ed. 2d 827.

THE JUDGMENT OF THE MIDDLE DISTRICT COURT WAS ENTERED ON PETITION FOR WRIT OF HABEAS CORPUS, FILED ON MAY 6, 2003 IN THE COURT [Id]:CIV.ACT 03-T-502-E JURISDICTION OF THIS COURT IS INVOKED UNDER 28 U.S.C. 1254(1); THE LOWER COURT HAD JURISDICTION UNDER 28 U.S.C. 1651. THE FOLLOWING JURY TRIAL IN THE STATE OF ALABAMA [CASE CC -98-1095] PETITIONER WAS CONVICTED FOR SEXUAL ABUSE IN THE FIRST DEGRE.[SEE STATEMENT OF FACTS/TRIAL AND DIRECT APPEAL. CIV. ACT. 03-T- 502-E IN THE UNITED STATES DISTRICT FOR THE MIDDLE DISTRICT OF ALABAMA EASTERN DIVISION].MAY 7, 2003 THIS CAUSE IS BEFORE THE COURT ON A 28 U.S.C. § 2254 PETITION FOR WRIT OF HABEAS CORPUS FILED BY TIMOTHY LEE SUNDAY, THE PETITIONER," VANZETTA PENN McPHERSON UNITED STATES MAGISTRATE PRESIDED PROCEEDING,MYRON THOMPSON.

SEE CONVICTION OR SENTENCE (PURSUANT TO RULE 32, ALABAMA RULES OF CRIMINAL PROCEDURE) FILED july 24, 2001 CASE # cc-98-1095 DATE OF JUDGMENT OF CONVICTION 2-17-00, LEE COUNTY , NOV. 8th 2003 IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT CIV. ACT 03-T- 502-E docket no.03-00-502 CV-T-E ENCLOSED MOTION FOR PANEL REHEARING, ADDENDUM FOLLOWING CERTIFICATE OF SERVICE B-1 through B-17 BY PERMISSION TO APPEAL IN THE FORM OF A CERTIFICATE OF APPEALABILITY [COA] C-1 THRU C-66] (Id).

FILED SEPT,22, 2003; APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA BEFORE ,**BLACK, BARKETT AND HULL, CIRCUIT JUDGES BY THE COURT. THIS APPEAL WAS DISMISSED**, SUA SPONTE, FOR LACK OF JURISDICTION. THE MAGISTRATE JUDGES SEPT. 17, 2003 ORDER DENYING TIMOTHY LEE SUNDAYS MOTION FOR CLARIFICATION IS NOT FINAL AND APPEALABLE. SEE 28 U.S.C. §§ 636 (b)(c) & 1991, PEREZ-PRIEGO V.ALACHUA COUNTY 148 F. 3d 1272,1273 (11th Cir. 1998);DONOVAN V. SARASOTA CONCRETE CO. 643 F. 2d 1061,1066-1067 (11th cir. 1982); GLOVER V. ALABAMA Bd. OF CORRECTIONS 660 F. 2d 120,122 (5th Cir. UNIT B OCT.1981).

MOTION FOR PANEL REHEARING: ADDENDUM FOLLOWING THE CERTIFICATE OF SERVICE WAS FILED NOV. 8th, 2003, CIV.ACT no. 03-T-502-E docket 31, FILED SEPTEMBER 22, 2003 (Doc. 30) WHICH THE COURT IS TREATING AS A MOTION TO PROCEED ON APPEAL IM FORMA PAUPERIS FILE OCT. 1, 2003. THE COURT IS OF THE OPINION, THAT THE PETITIONERS APPEAL IS WITHOUT A LEGAL OR FACTUAL BASIS AND, ACCORDINGLY IS FRIVOLOUS AND NOT TAKEN IN GOOD FAITH. SEE RUDOLPH 666 F. 2d 519, 520 (11th Cir. 1982); BROWN V. PENA 441 F. Supp. 1382 (S.D. Fla. 1977),Aff'd WITHOUT OPINION 589 F. 2d 1113 (5th Cir.1979). ACCORDINGLY IT IS ORDERED THAT THE PETITIONERS MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS BE AND IS THEREBY DENIED, AND THAT THE APPEAL IN THIS CAUSE BE AND IT IS THEREBY CERTIFIED PURSUANT TO 28 U.S.C. § 1915 (A) AS NOT TAKEN IN GOOD FAITH. DONE 1st day of OCT. 2003 MYRON H. THOMPSON U.S. DISTRICT JUDGE.

THE ENTITLED PETITION WAS APPLIED FOR CERTIORARI TO THE UNITED STATES SUPREME COURT AND RETURNED, RECEIVED SIGNED FOR 12-28-06, ESTERLING COR.FAC. DORM 7 SIGNED FOR ON INSTITUTIONAL LOG.PETITIONER OBJECTED TO THIS CLERK REFUSING TO FILE AND ACCEPR THIS ACTION AS UNCONSTITUTIONAL, AND ALLEGING THAT THE HIGHEST STATE, FEDERAL COURTS OF ALABAMA, ELEVENTH CIRCUIT, FOR HABEAS CORPUS IN HEARING MY APPEAL WAS DENIED. A CONTROVERSY, HAD BEFORE IT TRANSCRIPTS OF TRIAL PROCEEDINGS . (T.R. 386)(CORRECTED PAGE 386) THAT WAS HELD BACK FROM THE COURTS REVIEW, OR KNOWLEDGE OR IGNORED OF TRIAL PROCEEDINGS CC-98-1095 FRAUDULENTLY PREPARED BY THE PROSECUTOR GAIL MEEKS, NICK ABBOTT AND THE COURT REPORTER:[T.R.386:APPENDIX B#3] TRIAL RECORD 680 ;THE SAME THING HAPPENED IN **DAVIS V. ZANT** 36 F. 3d 1538 at1546 [11]; AND POSSIBLY CORINNE T. HURST, CLERK,.IN LOVING V. UNITED STATES (1996) 517 US 748, 135 L Ed. 2d 36, 116 S.Ct. 1737; RASUL V. BUSH (2004) 159 L Ed 2d 548; THE COURT CONCLUDED THAT ANY PERSON , INCLUDING AN ENEMY ALIAN, DEPRIVED OF HIS LIBERTY IN EISENTRAGER, 329 US at 767, 94 L ed 1255, 70 S Ct 936 --ANYWHERE UNDER ANY PURPORTED AUTHORITY OF THE UNITED STATES IS ENTITLED TO THE WRIT IF HE CAN SHOW THAT EXTENSION TO HIS CASE OF ANY CONSTITUTIONAL RIGHTS OR LIMITATIONS WOULD SHOW HIS IMPRISONMENT ILLEGAL: [AND] THAT. COURTS MUST BE HELD TO POSSESS STATUTORY JURISDICTION AS PART OF THE JUDICIAL POWER OF THE UNITED STATES.

PETITIONER HAS A CONSTITUTIONAL RIGHT TO HABEAS CORPUS SECURED BY THE SUSPENSION CLAUSE, U.S. CONST. ART. I, § 9, cl. 2, REASONING THAT, "IF A PERSON HAS A RIGHT TO A WRIT OF HABEAS CORPUS, HE CANNOT BE DEPRIVED OF THE PRIVILEGE BY AN OMISSION IN A FEDERAL JURISDICTIONAL STATUTE," EISENTRAGER V. FORRESTAL, 174 F. 2d, at 965. THE GREAT WRITS "ABILITY TO CUT THROUGH BARRIERS OF FORM AND PROCEDURAL MAZES," HARRIS, 394 US, at 291, 22 L ed 2d 281, 89 S Ct 1082; PROPER RESPONDENT IS THE PERSON "GWYNDOLIN MOSLEY, WARDEN EXERCISING THE LEGAL REALITY OF CONTROL OVER THE PETITIONER SUFFERS FROM THE SAME LOGICAL FLAW. PADILLA V. RUMSFELD 352 F. 3d 695 at 705, 707 (2nd cir. 2003):28 USC § 2242 [28 USCS § 2242]; SEE ALSO § 2243 (THE WRIT, OR ORDER TO SHOW CAUSE SHALL BE DIRECTED TO THE PERSON HAVING CUSTODY OF THE PERSON DETAINED"): FAY V. NOIA 372 US 391, 9 L ed 2d 837, 83 S Ct 822; [*372 US 421] CHESSMAN V. TEETS (1955) 350 US 3, 100 L ed 4, 76 S Ct 34.

REASONS FOR GRANTING THE WRIT :

PETITIONER CLAIMS THAT THE [AEDPA] UNCONSTITUTIONALLY RESTRICTS THIS COURT'S JURISDICTION, IS A LEGISLATIVE ACT, IN ANY FORM, THAT APPLIES "EITHER TO NAMED INDIVIDUALS OR TO EASILY ASCERTAINABLE MEMBERS OF A GROUP AS PETITIONER [A PRISONER] IN SUCH A WAY AS TO INFLICT PUNISHMENT WITHOUT A JUDICIAL TRIAL. CARMELL V. TEXAS (2000) 529 US 513, 146 L Ed 2d 577 at 597, 120 S Ct 1620; EX POST FACTO LAWS, [529 US 538].

A BILL OF ATTAINDER IS A LEGISLATIVE ACT WHICH INFLICTS PUNISHMENT WITHOUT JUDICIAL TRIAL...[L]EGISLATIVE ACTS, NO MATTER WHAT THEIR FORM,, THAT APPLY EITHER TO NAMED INDIVIDUALS OR TO EASILY ASCERTAINABLE MEMBERS OF A GROUP IN SUCH A WAY AS TO INFLICT PUNISHMENT ON THEM WITHOUT A JUDICIAL TRIAL ARE BILLS OF ATTAINDER PROHIBITED BY THE CONSTITUTION . UNITED STATES V. LOVETT, 328 US 303, 315-316, 90 L ed 1252, 66 S ct 1073 (1946)(internal quotation marks omitted). THE PROHIBITIONS ON EX POST FACTO LAWS AND ON BILLS OF ATTAINDER ARE OBVIOUSLY CLOSELY RELATED. SEE E.G..FLETCHER V. peck, 6 CRANCH 87, 138-139, 3 L Ed 162 (1810); CAL. DEPT. OF CORRECTIONS V. MORALES (1995) 514 US 499, 131 L Ed 2d 588 at 604, 115 S Ct 1547; GARMER V. JONES (2000) 529 US 244, 146 L ed 2d 236 at 248, 120 S Ct 1392;AND AN EX POST FACTO , BOUIE V. COLUMBIA ,378 US 347, 12 L ed 2d 894, 84 S ct 1697 ; THOMPSON V. UTAH , 170 US 343, 42 L Ed 1061, 18 S ct 620; CALDER V. BULL (US) 3 DA11 386, 1L ed 648.

THE STATUTE AT BAR IS SO BROAD AND DISCRIMINATIVE IN ITS REACH AS TO BE UNCONSTITUTIONAL UNDER THE FIFTH AMENDMENT ALONE. APTHEKER V. SECRETARY OF STATE, 378 US 500, 12 L ed 2d 992, 84 S ct 1659; SHELTON C TUCKER, 364 US 479, 5 L ed 2d 231, 81 S ct 247;KANSAS V KENDRICKS (1997) 521 US 346, 138 L ed 2d 501 at 526, 117 S ct 2072.

ABUSE OF 2: PETITIONER ALLEGES THAT THERE ARE CIRCUMSTANCES PRESENT IN THIS CASE WHICH " WOULD" ENTITLE [SUNDAY] TO RELIEF. PETITIONER IS WITH PERSONAL KNOWLEDGE OR INFORMATION SUFFICIENT TO FORM A BELIEF AS TO APPEAL FROM LEE COUNTY COUNTY VIRVUIT COURTS DECISIONS " CC 98-1095 : ALABAMA COURT OF CRIM. APP. DECISION CR-01-0207: IS AN ABUSE OF DISCRETION AND PRISONER HAS NOT HAD ADEQUATE ACCESS TO THE COURTS THROUGHOUT HIS INCARCERATION. AS TO EXH. # 1, CC-98-1095, CIV. ACT. NO. 03-T-502-E, THE COURT ABUSED ITS DISCRETION, DENIED APPEAL ON THE MERITS, violating 5 U.S.C. § 706 AND 28 U.S.C. § 1343 CIV. RIGHTS AND selective franchise, THE PETITIONER IN THE DISTRICT COURTS SHALL HAVE ORIGINAL JURISDICTION OF ALL CIVIL ACTIONS ARISING UNDER THE CONSTITUTION, LAWS OR TREATIES OF THE UNITED STATES , SEE 28 U.S.C. § 1985; § 1986. AS TO CIVIL NO. 03-T-502-E, THE PLEADING FILED BY [SUNDAY] ON FEB. 2, 2004, in which the court construes as motion to amend petition wherein petitioner asserts additional claims in support of his petition for relief, and for good cause. IT WAS ORDERED BY THE FED. MAG THAT : -- THE MOTION TO AMEND IS GRANTED--[SEE AMENDED PETITION]. AS [SUNDAY] ALSO ALLEGES TO THIS COURT. MAJ. VANZETTA PENN , cPERSON, US DISTRICT JUDGE MYRON THOMPSON DENIED REVIEW ON THE MERITS OF CLAIMS PRESENTED. HE AUTHORED A ONE PAGE OPINION OF CIVIL ACTION NO. 03-T- 502-E. THE RELIEF ALONE WAS INADEQUATE TO RESOLVE CONTROVERSY BETWEEN THE PARTIES." FERRELL, ET AL RESPONDENTS FEARED FURTHER LITIGATION BY "[MR. SUNDAY].

ACCORDINGLY SUNDAY PURSUED COMPLAINTS DEPOSITED INTO THE UNITED STATES DISTRICT COURT AND 1-20-04 CIV. ACT.03-T-502-EE,' opposition to said recommendations of magistrate ' mcPHERSON, OBJECTIONS MADE IDENTIFYING FINDINGS IN THE RECOMMENDATION OBJECTED TO AS REQUIRED BY LAW.THE PRITIONER EXERCISED IN DISCOVERY," FED.RULE of civ. proc. 26 (b)(1) AND 33 AND PETITIONER SHOWS GOOD CAUSE FOR EXAMINATION. SCHLAGENHAUS V. HOLDER 379 U.S. 104, 118 (1964):SWINT V. CHAMBERS COUNTY COMMISSION(1995) 514 US 35, 131 L.Ed 2d 60, 115 S CT 1203 : FERNANDEZ-ROQUE V. SMITH 671 F. 2d 426 (1982) AT 431 'supra';

3; PETITIONER OBJECTS TO THE MAGISTRATES FINDINGS. SEE 28 § 636(b)(1)(C): LEWIS V. SMITH 855 F. 2d 736, 738 (11th cir. 1988); nettles v. wainwright 677 F. 2d 404 (5th Cir. unit b 1982)(en banc).

4: PETITIONER LISTED PARTIES WHO HAS INFORMATION ABOUT LAWSUIT COMPLAINTS APPEAL. IN DISCLOSURE (A) AND DISCLOSURE (B) PROVIDING MORE INFORMATION EVIDENCE. FED. R. CIV. PRO. 26 (A)(1).

5: PETITIONER SEEKS REVIEW OF THE DISTRICT COURTS CORDERS IN DENOVO DETERMINATION BY THE DISTRICT JUDGE, OF THE FACTUAL FINDINGS OF THE MAGISTRATE 28 U.S.C. § 636(b)(1)(C):LEWIS V. SMITH," SUPRA, : NETTLES V. WAINWRIGHT " SUPRA".

6; PETITIONER ALLEGES THAT TAPES AND ORIGINAL RECORDS IN THIS CASE ARE ADEQAUTE FOR PURPOSES OF REVIEW. PURSUANT TO 28 U.S.C. § 1915 AND FED. R. CIV. P. 72(b), PETITIONER OBJECTS ACCORDINGLY, BUT IS UNABLE TO PAY THE FEE FOR A TRANSCRIPT, AND RESPECTFULLY BRINGS THIS TO THE ATTENTION OF THE COURT FOR A JUDICIAL DETERMINATION THAT TRANSCRIPTION IS NECESSARY, REQUIRED FOR AN ADEQUATE REVIEW, BEFORE THE UNITED STATES FOR ORDER TO PAY THE COSTS OF THE TRANSCRIPTS.

7: THE FEDERAL ISSUES PRESENTED WERE RAISED AND RULED ON BELOW OR PORTIONS THEREOF STATE CLAIMS UNDER WHICH RELIEF CAN BE GRANTED. THE EVIDENTIARY RULINGS ARE SO PREJUDICIAL AS TO DENY DUE PROCESS OR SOME OTHER CONSTITUTIONAL RIGHT. URGUHART V. LOCKHART 726 F. 2d 1316 (8th Cir. 1984);u.s. v. vallery 108 F. 3d 155 (8th cir. 1997):

8; EACH OF THE ISSUES PRESENTED BY [SUNDAY] WAS EXPRESSLY RAISED IN THE COURTS BELOW. " PETITION CC?_(cc-98-1095: TRIAL COURT PETITON [CR-01-0207] COURT OF CRIM. AP.; PETITION FOR WRIT OF CERT.

'020562 FILED 1-28-03: CIV. ACT. 03-T- 502-E EXECUTED AT EASTERLING COR. FAC. ON 3rd DAY JULY, 2003,: CC-98-1095 INTRODUCTION: EXH. NO. I(i) CC-98-1095, QUESTION PRESENTED, EXH.I(i) CC 98-1095 LEGAL CLAIM I(i), ISSUE ARGUMENT I(A): CIV. ACT . 03-T- 502-E, OPPOSITION OF RESPONDENTS ANSWER TO COURTS ORDER -9-

TO SHOW CAUSE. VANZETTA PENN Mcpherson.

9: AS NOTE ABOVE, THE COURT DID NOT EXPRESSLY RULE ON PETITIONERS FEDERAL CLAIMS. BECAUSE THE JUDGMENT NECESSARILY REJECTS THOSE FEDERAL CLAIMS, THE MERITS, HOWEVER, THOSE FEDERAL QUESTIONS ARE SQUARLY PRESENTED HERE. THE DISTRICT COURTS SHALL HAVE ORIGINAL JURISDICTION OF ALL CIVIL ACTIONS ARISING UNDER THE CONSTITUTION, LAWS OR TREATIES OF THE UNITED STATES 28 USC§ 1331.

10: FEW ISSUES COULD BE MORE IMPORTANT THAN THE ISSUES PRESENTED IN THIS CASE. AT STAKE IS THE LAWFUL RESOLUTION OF AN INNOCENT MAN. A MAN ACTUALLY INNOCENT. SEE MURAY V. CARRIER 477 U.S. 478, 496, 106 S.Ct. 2634,2649-50, 91 L. ed 2d 397 (1985):SMITH V. MURRAY 477 U.S. 527, 106 S.Ct. 2661,2667-68, 91 L. ed 2d 434 (1986): SHLUP V. DELO 513 US 298, 320, 130 L.Ed. 2d 808, 115 S.Ct. 851 (1995): McCOY V. NORRIS, 958 F. SUPP. 420 (E.D.ARK. 1996): SAWYER V. COLLINS 494 U.S. 1025, 108 L Ed 2d 606, 110 S CT 1468,(1990): SELVAGE V. COLLINS 494 US 108,108 L Ed 2d 93, 110 S CT 974 (1990):BOUSELY V. UNITED STATES 523 U.S. _____, 140 L.Ed. 2d 828, 118 S Ct _____(1998) (CASE IS TORN OUT OF BOOK): DUGGER V. ADAMS 489 U.S. at 401,411 n.6, 109 S.Ct. 1217 n. 6, 103 2d 435 (1989): U.S. V. McKIE, 73 F. 3d 114, (D.C.CIR. 1996): BARDEN V. KEOHANE 921 F. 2d 476 (3rd Cir. 1990);U.S. V. SHAIK 916 F. 2d 984 (5th cir. 1990): EWING V. McMAHIN 799 F. 2d 1143 (6th Cir.1986);GONZALEZ V. ABBOTT 967 F. 2d 1499 (11th Cir.1992);

ACTUAL INNOCENCE" BONEGO V. U.S. 975 F. Supp. 520 (S.D.N.Y. 1997); DUGGER V. ADAMS 489 U.S. at 401,411 n.6, 109 S. Ct. 1211,1217 n. 6, 103 L ed. 2d 435 (1989); U.S. V. MAYBECK 23 F. 3d 888 (4th cir. 94); HENDERSON V. SARGENT, 926 F. 2d 706 (8th Cir. 91): JONES V. ARKANSAS '929 F. 2d 375, 381 (8th Cir. 91):

11: IN THE EXCEPTIONAL CIRCUMSTANCES OF THIS CASE, CONTRARY TO RESPONDENTS ALLEGATIONS, RULE 60 (b) RELIEF IS APPROPRIATE AND OFFENDS NO STATUTORY PROSCRIPTION OR POLICY CONCERN AGAINST SECOND OR SUCCESSIVE HABEAS PETITIONS. THE COURT SHOULD VACATE THE DECISION BELOW AND REMAND TO THE DISTRICT COURT WITH DIRECTION, TO GRANT PETITIONERS 60 (b) MOTION SO THAT HIS PROPERLY PRESENTED CLAIMS , PROSECUTORIAL MISCONDUCT CAN BE HEARD ON THE MERITS AND REVIEWED BY A FEDERAL COURT: KNOWING USE OF PERJURED TESTIMONY BY THE PROSECUTOR, STATE OF ALABAMA, RESPONDENTS. ANY PRIOPER EXERCISE OF RULE 60(b) DISCRETION WOULD REQUIRE RELIEF FROM THE DISTRICT COURTS JUDGMENT. THE FACT THAT A 60(b) MOTION CANNOT BE VIEWED AS THE FUNCTIONAL EQUIVALENT OF A SUCCESSIVE APPLICATION. THIS CASE IS THE RARE CASE IN WHICH A 60(b) MOTION RAISING NO ISSUE OUTSIDE THE FOUR CORNERS OF THE ORIGINAL HABEAS APPLICATION DOES MEET 60 (b) CRITERIA, AND INDEED COMPELS AN EXERCISE OF DISCRETION TO REOPEN THE JUDGMENT. IT DOES SO FOR THE FOLLOWING CONSTELLATION OF EXTRAORDINARY REASONS.

the district court never exercised rule 60 (b) DISCRETION. A REMAND TO THE DISTRICT COURT TO EXERCISE DISCRETION " IN THE FIRST INSTANCE IS REQUIRED, HOWEVER, BECAUSE THE PROPER OUTCOME IS CLEAR. CF. BRILLHART V. EXCESS INS. CO. 316 U.S. 491, 496 (1942).

THE JUDGMENT THAT PETITIONER SEEKS TO REOPEN IS BASED ENTIRELY ON A PROCEDURAL IMPEDIMENT THAT PREVENTED THE DISTRICT COURT FROM ADDRESSING THE CONSTITUTIONAL MERITS OF SUBSTANTIAL CLAIMS OF EGREGIOUS PROSECUTORIAL MISCONDUCT [R.680][R.383 -386]: SEE 39 (K) motion , 'case number cr-99-1045 ON APPEAL FROM THE CIRCUIT COURT OF LEE COUNTY, ALABAMA, CASE NUMBER CC-98-1095 FILED BY T. ROBIN McINTYRE, ATTORNEY FOR DEFENDANT, THAT WAS HELD BACK OR HIDDEN, MISREPRESENTED TO AND FROM THE COURTS REVIEW, CORRECTED PAGE 386 from LINE 22 to 25 SHOULD BE AS FOLLOWS: LINE. 22: "Q" OKAY 23; A. THEY WAS STILL TELLING ME --- THEY WERE TELLING ME AT THE TABLE. I WAS KIND OF EMBARRASSED. 24: "Q" OKAY I KNOW. I KNOW ITS HARD CINDY. DO YOU REALLY REMEMBER WHAT HAPPENED ?[SEE EXH. S-III OF CIV. ACT 03-T-502 -E IN THE DISTRICT COURT , [T.R. 680, CC-98-1095].

12: RESPONDENT DOES NOT DISPUTE THE SERIOUSNESS OF PETITIONERS PROSECUTORIAL MISCONDUCT CLAIMS.[CIV. ACT 03-T-502-E: CC-98-1095]. THE QUESTION THE EFFECT OF [R.680, 386] THE MISCONDUCT THEY DONT DISPUTE THAT IT OCCURRED. EXH. #1 CC-98-1095.

BUT IN DOING SO THEY REFUSED TO HIGHLIGHT HOW SERIOUSLY THE VIOATION CORRUPTED THE PENALTY PHASE VERDICT. CF. SEMTEK INT'L INC. V. LOCKHEED CORP. 531 U.S.492, 501-02 (2001)(AND ONLY A JUDGMENT THAT PASSES DIRECTLY ON THE SUBSTANCE OF [A PARTICULAR] CLAIM, TRIGGERS THE DOCTRINE OF RESJUDICATA AND ITS FULL RANGE OF FINALITY INTERESTS): SLACK, 529 U.S. at 483 (THE WRIT OF HABEAS CORPUS PLAYS A VITAL ROLE IN PROTECTING CONSTITUTIONAL RIGHTS, AND CONGRESS [HAS] EXPRESSED NO INTENTION TO ALLOW [DISTRICT] court PROCEDURAL ERROR.

WHERE THE DISTRICT COURT [ERRONEOUSLY] RELIES ON PROCEDURAL GROUNDS TO DISMISS THE PETITION, 'TO BAR VINDICATION OF SUBSTANTIAL CONSTITUTIONAL RIGHTS. SEE JUNE 23rd, 2003," JOHN M. PORTER ASSISTANT ATTORNEY GENERAL. RESPONDENTS ANSWER TO COURTS ORDER TO SHOW CAUSE IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA 03-T-502-E, SEE EXH. I(i) CC 98-1095.

PETITIONER ARGUES THAT THE DISTRICT COURTS, STATE, IS CONTRARY OR INVOLVE AN UNREASONABLE APPLICATION OF FEDERAL LAW AS DETERMINED BY THE UNITED STATES SUPREME COURT. WILLIAMS V. TAYLOR (2000) 146 L. Ed. 2d 389 at 425,427;

12: THE MERITS OF THE FACTUAL DISPUTE WERE NOT RESOLVED: SEE PETITION ,NO:03-T-502-E; amendment ' wheter trial court commit reversible error, when the court admitted CYNTHIA THROWERS IN COURT IDENTIFICATION OF THE DEFENDANT (III) STATEMENT OF THE FACTS PAGE (II) THROUGHOUT (XIII). SEE SUMNER V. MATA, 455 u.s. 592, 597 (1982;

13: AS THE CLAIM TURNS UPON THE FACTS, THE TESTI,ONY AT THE TRIAL REGARDING THE DEFENDANT AND THE IDENTIFICATION, SECONDARY FACTS BY WHICH A PRINCIPLE FACT MAY BE RATIONALLY INFERRED: THE ALLEGED VICTIM TESTIFIED AT TRIAL IN CASE CC-98-1095 THAT: PEOPLE TOLD HER WHAT TO SAY ABOUT TIMMY [SUNDAY]. TOLD HER WHAT TO TELL DEFENSE COUNSEL, THE COURT AND THE JURY.

14: CLAIM I(i) PETITIONERS CONVICTION WAS OBTAINED AS A RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL, AS GUARANTEED BY THE UNITED STATES CONSTITUTION, FIFTH, FOURTEENTH AMENDMENTS, SIXTH THERETO. STRICKLAND V. WASHINGTON 466 U.S. 668 (1984):

TRIAL COUNSEL MR. JEFF TICKAL WAS INEFFECTIVE FOR FAILING TO OBJECT AND PRESERVE FOR DIRECT REVIEW THE ASSISTANT DISTRICT ATTORNEY GAIL MEEKS KNOWING USE OF PERJURED TESTIMONY. BECAUSE THE RECORD CONTAINS EVIDENCE THAT THE PROSECUTOR KNOWINGLY USED PERJURED TESTIMONY TO OBTAIN A CONVICTION (R. 383) CC-98-1095 OR THAT THE PERJURED TESTIMONY WAS ON A MATTER OF SUCH IMPORTANCE THAT THE NEWLY DISCOVERED EVIDENCE (R.386, 680) CC-98-1095 WOULD HAVE PREVENTED A CONVICTION, THIS COURT SHOULD FIND TRIAL COURT ABUSED ITS DISCRETION IN DENYING [SUNDAYS] RULE 32, POST CONVICTION APPLICATION. 5 USC § 706.

VISABLE FROM THE SWORN TESTIMONY, IT IS CLEAR, THE CLERK RECORD 0022; PG. -2- OF THE SUPPORTING FACTS FOR CLAIM NO.I(i) FILED JULY, 2001 IN OFFICE CORINNE T. HURST CIRCUIT CLERK OF THE LEE COUNTY COURTS CASE UNDER ATTACK # CC-98-1095.

ADDITIONALLY, THOUGH NOT MENTIONED BY RESPONDENTS, ASSISTANT ATTORNEY GEN. "MR. JOHN M. PORTER, [CYNTHIA] SHE TESTIFIED AT RULE 39(K) MOTION CC-98-1095 FILED BY ATTORNEY ROBYN MCINTYRE CASE CC-98-1045, PAGE 386 FROM LINE 22 to 25 ³CORRECTED PAGE 386 kept back from the courts review or misrepresented by respondents committing fraud upon the court. see appendix #

B #3, "Exh. 9-III CIVACT. 03-7-502-6"

13: PETITIONERS 60(b) MOTION REASSERTS CLAIMS FOR HABEAS CORPUS RELIEF THAT WERE PRESENTED IN HIS ORIGINAL PETITION. THE MOTION EXPRESSLY RELIES ON EVIDENCE ... IN THE ... RECORD CASE # CC-98-1095 OF THE ORIGINAL PROCEEDING AND THE BASIS FOR 60(b) MOTION OF THE RULES OF FEDERAL PROCEDURE.

IN CHESSMAN V. TEETS (19550 350 U.S. 3, 100 L. Ed.4, 76 S. Ct. 34; IT APPEARED THAT ONE OF CRIME IN A CALIFORNIA COURT PETITIONED A FEDERAL COURT FOR HABEAS ALLEGING THAT THE HIGHEST CALIFORNIA COURT, IN HEARING HIS APPEAL HAD BEFORE IT A TRANSCRIPT OF THE TRIAL PROCEEDINGS WHICH HAD BEEN FRAUDULENTLY PREPARED BY THE PROSECUTING ATTORNEY AND THE COURT REPORTER. THE DISTRICT COURT SUMMARILY DISMISSED THE APPLICATION AND THE COURT OF APPEALS FOR THE NIN TH CIRCUIT AFFIRMED. ON CERTIORARI

FIVE MEMBERS OF THE SUPREME COURT, REED, BURTON AND CLARK, JJ, DISSENTED WITHOUT OPINION, WARREN, CH. J. DID NOT PARTICIPATE, IN PER CURIAM OPINION, REVERSED THE JUDGMENT OF THE COURT OF APPEALS AND REMANDED THE CASE TO THE DISTRICT COURT FOR A HEARING. IT WAS STATED THAT, WITHOUT INTIMATING ANY OPINION REGARDING THE VALIDITY OF THE PETITIONERS CLAIM, IN THE CIRCUMSTANCES DISCLOSED BY THE RECORD THE PETITION SHOULD NOT HAVE BEEN SUMMARILY DISMISSED.

THE COURT IN PRICE V. JOHNSTON (1948) 334 US 266, 92 L. Ed. 1356, 68 S Ct 1049, HELD THAT A DISTRICT COURT ERRED IN DISMISSING , WITHOUT A HEARING, A PETITION FOR HABEAS CORPUS FILED BY ONE CONVICTED OF CRIME IN A FEDERAL COURT. WHERE ALTHOUGH IT APPEARED THAT THREE EARLIER PETITIONS FOR HABEAS CORPUS BY THE SAME PETITIONER HAD BEEN DENIED, THE FOURTH PETITION CONTAINED THE ALLEGATION THAT THE PETITIONERS CONVICTION WAS OBTAINED BY TESTIMONY WHICH THE PROSECUTION KNEW TO BE FALSE, THIS CONTENTION WAS NOT MADE IN THE THREE EARLIER PETITIONS, AND ALTHOUGH PETITIONER KNEW, AT THE TIME HE MADE THE EARLIER PETITIONS, THAT THE SINGLE WITNESS FOR THE PROSECUTION HAD CHRGED^A HIS TESTIMONY AFTER CONFERENCE WITH THE PROSECUTING ATTORNEY, IT DIDNOT APPEAR EITHER^F THAT HE THEN KNEW THAT THE CHANGED TESTIMONY TO BE FALSE, OR THAT THERE WERE NO ADEQUATE REASONS FOR NOT MAKING THE ALLEGATIONS EARLIER (SUCH AS UNAWARENESS OF THE SIGNIFICANCE OF THE RELEVANT FACTS).

15: THE PETITIONS FOR LEAVE TO APPEAL STATE SPECIFIC OBJECTIONS TO THE JUDGMENT CC98-1095' CIV.ACT. 03-T- 502-E REGARDING CIRCUMSTANCES PRESENT IN THIS CASE WHICH ENTITLE [SUNDAY] IN THE INTEREST OF JUSTICE. SPECIAL CIRCUMSTANCES EXIST THAT THE ONE YEAR TIMELINE RESPONDENTS ALLEGE IN RECOMMENDATION OF THE MAGISTRATE JUDGE PG. #3. THE STATE CREATED AN IMPEDIMENT (OBSTRUCTION OR HINDERENCE) IN VIOLATION OF THE CONSTITUTION OR LAWS OF THE UNITED STATES THAT PREVENTED PETITIONER FROM FILING THE APPLICATION OR MOTIONS, IN HIS HABEAS CORPUS PETITION BECOMES DUE ONE YEAR AFTER THE UNCONSTITUTIONAL OR ILLEGAL IMPEDIMENT WAS REMOVED. 28 U.S.C. § 2244 (d)(1)(B)(2000). EXAMPLE:

[i]: THE STATES WITHHOLDING OF EXCULPATORY EVIDENCE : APP. #. APPENDIX B #3; Exh-S-12 03-T-502-E; APP. III & IV. :

IN VIOLATION OF BRADY V. MARYLAND, 373 U.S. 83, 83 S. Ct. 2531, 10 L. Ed. 2d 215 (1963): SEE EDMOND V. UNITED STATES ATTORNEY 959 F. Supp. 1,4 (D.D.C.1997);

[ii]: THE STATE CREATED IMPEDIMENT MAY BE INADEQUATE PRISON LIBRARIES. SEE WHALEM/HUNT V. EARLY 233 F. 3d 1146 (9th Cir. 2000)(remanding case for evidentiary hearing as to whether petitioners claim that an unconstitutional impediment existed because of lack of information in the prison law library may be upheld). where state prison authorities, in violation of equal protection clause of fourteenth amendment, frustrated prisoners attempt to file timely appeal from his conviction, federal district court in habeas corpus proceedings should enter such orders as are appropriate --

TO ALLOW STATE REASONABLE TIME IN WHICH TO AFFORD PRISONER FULL PPELLATE REVIEW HE SHOULD HAVE RECIEVED DUT FOR FRUSTRATION OF HIS APPEAL, FAILING WHICH HE SHALL BE DISCHARGED. DOWD V. UNITED STATES (1951) 340 U.S. 206, 95 L.ed. 215, 71 S Ct. 262, 19 ALR 784.

THE PETITIONS FOR APPEAL STATE SPECIFIC OBJECTIONS TO THE JUDGMENT, REGARDING INJURUES HE RECEIVE FROM PRISON OFFICIALS DURING HIS ACCESS TO APPEAL, TO COURT, RESOURCES, AND CASES WERE DISMISSED. THE LAW LIBRARY ACCESS WAS WOEFULLY INADEQUATE, MALFUNCTIONING TYPEWRITERS. LAW LIBRARY SUPERINTENDENT OFFICER GAVINS PLACED UNEQUAL TREATMENT TO PETITIONER AN INMATE. SEE BOUNDS V. SMITH 430 US 817,823, 97 S. Ct. 1491, 1495, 52 L. ed 2d 72,79 (1977); MANN V. SMITH 796 F. 2d 79 ,83-85 (5th Cir.86): WILLIAMS V. LEOKE 584 F. 2 1336, 1340 (4th Cir. 78) CERT. DENIED 442 U.S. 9111 (1979); STRAUB V. MUNGE 815 F. 2d 1467, 1470 (11th Cir. 87); GILMORE V. LYNCH 319 F. Supp.105,111 (N.D.Cal.70): KNOP V. JOHNSON 977 F. 2d 996 , 1000(6th Cir. 92): BONNER V. CITY OF PRITHARD ALA. 661 F. 2d 1206, 1212-13 (11th Cir. 81): WOLFF V. McDONNELL 418 U.S. 539, 579, 94 S. Ct. 2963 (1974): PETERKIN V. JEFFES 855 F. 2d at 1037 : JACKSON V. PROCUNIER 789 F. 2d 307, 311 (5th Cir. 81): COFIELD V. ALABAMA PUBLIC SERVICK COMMISSION 936 F. 2d 512, 517 (11th Cir. 91);

[SUNDAY], PRISONER IN SEG, DURING HIS APPEAL PROCESS AT THE TIME OF FILINGS WERE SUPPOSED TO HAVE ACCESS TO THE LAW LIBRARY.

HOWEVER, ONCE OR TWICE A WEEK WERE DELIVERED TWO BOOKS FROMM MARH 3, 2006 TO APRIL 17 [RECOMENDATION pg.#2].

16; PETITIONER REQUESTED EXIGENTLY AN INK PEN TO WRITE CERTIORARI AND OFFICER GAVINS DENIED REQUEST, THEREFORE PETITIONER DID NOT HAVE WRITING RESOURCES TO ANSWER PETITIONS, APPLICATIONS TO THE COURT SYSTEM TO APPEAL, AND WAS DENIED FILING BECAUSE OF OUT OF TIME. PETITIONER FILED NUMEROUS REQUESTS, COMPLAINTS ADDRESSED TO OFFICER GAVINS, HIS UNCLE CAPT. SCONYERS COMPLAINTS OF FACING COURT DEADLINES AND OF BEING DENIED ACCESS TO THE LAW LIBRARY AND RESOURCES TO ANSWER AND PRESENT APPLICATIONS TO APPEAL. PETITIONER ADVISED OFFICER GAVINS OF LEGAL PROCEEDINGS, ACCESS, RE SOURCES NEEDED. GRIEVANCES FILED SINCE MAY 20, 2003 [WHEN SUNDAYS 1st HABEAS CORPUS PETITION WAS GRANTED ACCES INFORMA PAUPERIS, [SUNDAY ARRIVED AT EASTERLING CORRECTIONAL FACILITY AND ALL HAVE BEEN UNANSWERED AND PETITIONER HAS BEEN DENIED ADEQUATE ACCES TO THE COURTS, IMPOSED , IMPEDED BY ACTIONS OF SUCH PRISON OFFICIAL MISCONDUCT, AS [SUNDAY[PLEAS TO THIS HONORABLE COURT ACTUAL INOCENSE, OF BEING VICTIM OF A FUNDAMENTAL MISCARRIAGE OF JUSTICE AND PRESENTS CIRCUMSTANCES, FRUSTRATED OR IMPEDED IN PURSUING NONFRIVOLOUS CLAIMS BECAUSE OF THESE INADEQUACIES. " SEE THE RECORD: SEE LEWIS V. CASEY, 518 U.S. 343, 349 , 116 S. Ct. 2174,2179, 135 L. Ed. 2d 606, 616 (1996), 351 Id; STATE HAS NOT FULFILLED ITS DUTY BY PROVIDING PETITIONER WITH LEGAL RESOURCES, MATERIALS PERTAINING TO STATE IN WHICH CONVICTION WAS DECIDED. SEE eg.CANY V. FARRELLY 957 F. Supp. 727, 741-42 (D.V. 1997).

17; THE MAIL PROCEEDING SYSTEM AT THE PRISON WAS WOEFULLY INADEQUATE. MAIL WAS FREQUENTLY LOST OR MISPLACED, RETURNED TO SENDER. PETITIONER RECEIVED MAIL WITH COURT DOCUMENTS CUT IN PIECES, UNREADABLE, ENVELOPES MARKED RECEIVED WITH THE DATE OF ALMOST TWO MONTHS BEFORE STAMPED ON THEM.[SUNDAYS] COURT ORDERS WERE RETURNED TO THE ELEVENTH CIRCUIT COURT OF APPEALS SAYING INMATE EXPIRED, COURT ORDERED PETITIONER TO RESPOND WITHIN 14 DAYS, OR BE DISMISSED. SUNDAY SIGNED FOR LEGAL DOCUMENTS ON OR AROUND APRIL 12, ORDERED MARCH? 3, AROUND 42 days after order . prison logs or other records evidence delivery by prison authorities the day [SUNDAY] SIGNED AND RECEIVED. WASHINGTON V. UNITED STATES 243 F. 3d 1299, 1301 (11th Cir. 2001); GRVEY V. VAUGHN 993 F. 2d 776 , 780 (11th Cir. 93); ADAMS V. UNITED STATES 173 F. 3d 1339, 1340-41(11th Cir. 99): HOUSTON V. LACK 487 U.S. 266, 271-272 (1988).

18: PETITIONER [SUNDAY] HAS SUFFERED EXTREME EMPTIONAL HARM AND DEPRESSION, EMBRACING ALL FORMS OF MENTAL PAIN, INCLUDING DEEP GRIEF, DISTRESS, ANXIETY AND FRIGHT. THE LOSS OF ACTIONS IN THE ELEVENTH CIRCUIT COURT OF APPEALS, THE UNITED STATES SUPREME COURT REFUSING TO FILE APPEAL BECAUSE PETITIONER WAS OUT OF TIME, BECAUSE OFFICER GAVINS WOULD NOT PROVIDE AN INK PEN TO WRITE APPEAL WHEN REQUESTED,. THE ABOVE COURTS, HAVE HELD THAT THE RIGHT OF ACCESS TO THE COURTS INCLUDES PROVIDING INDIGENT PRISONERS WITH PAPER AND PEN TO DRAFT LEGAL DOCUMENTS, WITH SERVECES OF A NOTARY TO AUTHENTICATE THEM, AND WITH STAMPS TO MAIL THEM. BOUNDS V. SMITH 430 U.S. 817, 824-25, 97 S.Ct.1491,1496, 52 L. Ed. 2d 72, 81 (1977).

CONCLUSION

APPLICATION TO APPEAL SHOULD BE GRANTED AND FORE THE FORGOING REASONS IS NOT A @ND AND SUCCESIVE PETITION.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THE ABOVE INSTRUMENTS MAILED
DEPOSITED IN THE UNITED STATES POSTAL SERVICE TO
RESPONDENT STATE OF ALABAMA, AND THE COURT THIS THE 23rd
DAY OF AUGUST 2007.
PURSUANT TO TITLE 28 UNITED STATES CODE SERVICE I
DECLARE UNDER SECTION 1746.

Tim Sunday

TIMOTHY LEE SUNDAY , INCARCERATED PETITIONER PRO SE.

Timothy Lee SUNDAY #213453
Easterling Con. Fd. DI-45-A
200 WALLACE DRIVE
CLIO, MI 36107

This correspondence is forwarded from an
Alabama (State Prison) Tim Lee Sunday was not born
excluded, and the information was not in the
correction is not information for the substance
of content of the enclosed correspondence.
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DEBRA P. HACKETT, CLK
U.S. DISTRICT COURT
MIDDLE DISTRICT ALA

TIMOMTY LEE SUNDAY AIS 213453
EASTERLING CORRECTIONAL FACILITY
200 WALLACE DRIVE
CLIO AL 36017-2613

CASE 3:07cv723

TIMOTHY LEE SUNDAY , 213453,

PETITIONER,

V.

LEE COUNTY CIRCUIT COURT, et al.,

respondents.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

TIMOTHY LEE SUNDAY , PETITIONER V. GWENDOLYN MOSELY, WARDEN
EASTERLING CORRECTIONAL CENTER:

ON RULE 60 b MOTION TO THE COURT OF APPEALS FOR
THE WRIT OF HABEAS CORPUS

FACTS

COUNT ONE :

THE STATE OF ALABAMA, LEE COUNTY CIRCUIT COURT, FALL
TERM, 1998 ; the grand jury of said county charge that
before the finding of this Indictment CC98-1095 TIMOTHY
LEE SUNDAY, ALIAS TIMMY SUNDAY , WHOSE TRUE CHRISTIAN NAME
IS OTHERWISE UNKNOWN TO THE GRAND JURY, DID ENGAGE
IN SEXUAL INTERCOURSE WITH CYNTHIA DAWN THROWER, A FEMALE,
WHOS WAS INCAPABLE OF CONSENT BY REASON OF BEING PHYSIC-
ALLY HELPLESS OR MENTALLY INCAPACITATED, IN VIOLATION
OF § 13 A-6-61 OF THE CODE OF ALABAMA,

COUNT II:

**AND THE GRAND JURY FURTHER CHARGE THAT BEFORE THE
FINDING** OF THIS INDICTMENT CC 98- 1095,01 TIMOTHY LEE SUNDAY,
ALIAS TIMMY SUNDAY, WHOSE TRUE CHRISTIAN NAME IS OTHERWISE
UNKNOWN TO THE GRAND JURY, A MALE, DID ENGAGE IN SEXUAL
INTERCOURSE WITH CYNTHIA DAWN THROWER, A FEMALE, BY FORCIB-
LE COMPULSION, IN VIOLATION OF § 13 A-6-61 OF THE CODE
OF ALABAMA.

CONTRARY TO RESPONDENTS RECOMMENDATION. IN THE PRIOR HABEAS ACTION, THIS COURT DENIED [SUNDAY] RELIEF FROM HIS SEXUAL ABUSE CONVICTION WITHOUT REVIEWING THE MERITS OF PETITIONERS CLAIMS. CLEARLY ESTABLISHED LAW PROVIDES THE RELIEF REQUESTED. 28 USCS § 2244; THE AMENDMENT^T PROPOSED TO MODIFY THIS PROVISION SO THAT, WHILE A JUDGE NEED NOT ENTERTAIN SUCH A LATER APPLICATION FOR THE WRIT UNDER SUCH CIRCUMSTANCES, HE IS NOT PROHIBITED FROM DOING SO IF IN HIS DISCRETION HE THINKS THE ENDS OF JUSTICE REQUIRE ITS CONSIDERATION. IN VIEW OF THE AMENDMENT WHICH WILL PERMIT A SECOND APPLICATION TO BE CONSIDERED WHEN THE ENDS OF JUSTICE REQUIRE IT, THE ORIGINAL PROVISION OF THE SECTION, AUTHORIZING THE JUDGE WHO HEARD THE ORIGINAL APPLICATION TO GRANT A REHEARING THEREOF, IS OMITTED BY THE AMENDMENT AS UNNECESSARY. ACCORDINGLY THE REFERENCE TO REHEARING IN THE CATCH LINE OF THE SECTION IS OMITTED. "A CLAIM CONTAINED IN A STATE PRISONERS SUCCESSIVE PETITION THAT WAS PRESENTED IN A PRIOR PETITION "SHALL BE DISMISSED." 28 USCS § 2244(b)(1). HOWEVER, THIS APPLIES ONLY TO CLAIMS THAT WERE DISPOSED ON THE MERITS. SLACK V. McDANIEL, 529 U.S. 473, 146 L.Ed. 2d 542, 120 S Ct. 1595 (2000). NEVER THE LESS, SUPREME COURT REVIEW OF A SUCCESSIVE PETITION MAY STILL AVAILABLE BECAUSE THE SUCCESSIVE PETITION CAN BE FILED AS AN ORIGINAL PETITION IN THE SUPREME COURT, UNDER 28 USCS § 2241(a). FELKER V. TURPIN, 518 U.S. 651, 135 L. ed. 2d 827.

THE JUDGMENT OF THE MIDDLE DISTRICT COURT WAS ENTERED ON PETITION FOR WRIT OF HABEAS CORPUS, FILED ON MAY 6, 2003 IN THE COURT [Id]:CIV.ACT 03-T-502-E JURISDICTION OF THIS COURT IS INVOKED UNDER 28 U.S.C. 1254(1); THE LOWER COURT HAD JURISDICTION UNDER 28 U.S.C. 1651. THE FOLLOWING JURY TRIAL IN THE STATE OF ALABAMA [CASE CC -98-1095] PETITIONER WAS CONVICTED FOR SEXUAL ABUSE IN THE FIRST DEGRE.[SEE STATEMENT OF FACTS/TRIAL AND DIRECT APPEAL. CIV. ACT. 03-T- 502-E IN THE UNITED STATES DISTRICT FOR THE MIDDLE DISTRICT OF ALABAMA EASTERN DIVISION].MAY 7, 2003 THIS CAUSE IS BEFORE THE COURT ON A 28 U.S.C. § 2254 PETITION FOR WRIT OF HABEAS CORPUS FILED BY TIMOTHY LEE SUNDAY, THE PETITIONER," VANZETTA PENN McPHERSON UNITED STATES MAGISTRATE PRESIDED PROCEEDING,MYRON THOMPSON.

SEE CONVICTION OR SENTENCE (PURSUANT TO RULE 32, ALABAMA RULES OF CRIMINAL PROCEDURE) FILED july 24, 2001 CASE # cc-98-1095 DATE OF JUDGMENT OF CONVICTION 2-17-00, LEE COUNTY , NOV. 8th 2003 IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT CIV. ACT 03-T- 502-E docket no.03-00-502 CV-T-E ENCLOSED MOTION FOR PANEL REHEARING, ADDENDUM FOLLOWING CERTIFICATE OF SERVICE B-1 through B-17 BY PERMISSION TO APPEAL IN THE FORM OF A CERTIFICATE OF APPEALABILITY [COA] C-1 THRU C-66] (Id).

FILED SEPT,22, 2003; APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA BEFORE ,**BLACK, BARKETT AND HULL, CIRCUIT JUDGES BY THE COURT. THIS APPEAL WAS DISMISSED**, SUA SPONTE, FOR LACK OF JURISDICTION. THE MAGISTRATE JUDGES SEPT. 17, 2003 ORDER DENYING TIMOTHY LEE SUNDAYS MOTION FOR CLARIFICATION IS NOT FINAL AND APPEALABLE. SEE 28 U.S.C. §§ 636 (b)(c) & 1991, PEREZ-PRIEGO V.ALACHUA COUNTY 148 F. 3d 1272,1273 (11th Cir. 1998);DONOVAN V. SARASOTA CONCRETE CO. 643 F. 2d 1061,1066-1067 (11th cir. 1982); GLOVER V. ALABAMA Bd. OF CORRECTIONS 660 F. 2d 120,122 (5th Cir. UNIT B OCT.1981).

MOTION FOR PANEL REHEARING: ADDENDUM FOLLOWING THE CERTIFICATE OF SERVICE WAS FILED NOV. 8th, 2003, CIV.ACT no. 03-T-502-E docket 31, FILED SEPTEMBER 22, 2003 (Doc. 30) WHICH THE COURT IS TREATING AS A MOTION TO PROCEED ON APPEAL IM FORMA PAUPERIS FILE OCT. 1, 2003. THE COURT IS OF THE OPINION, THAT THE PETITIONERS APPEAL IS WITHOUT A LEGAL OR FACTUAL BASIS AND, ACCORDINGLY IS FRIVOLOUS AND NOT TAKEN IN GOOD FAITH. SEE RUDOLPH 666 F. 2d 519, 520 (11th Cir. 1982); BROWN V. PENA 441 F. Supp. 1382 (S.D. Fla. 1977),Aff'd WITHOUT OPINION 589 F. 2d 1113 (5th Cir.1979). ACCORDINGLY IT IS ORDERED THAT THE PETITIONERS MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS BE AND IS THEREBY DENIED, AND THAT THE APPEAL IN THIS CAUSE BE AND IT IS THEREBY CERTIFIED PURSUANT TO 28 U.S.C. § 1915 (A) AS NOT TAKEN IN GOOD FAITH. DONE 1st day of OCT. 2003 MYRON H. THOMPSON U.S. DISTRICT JUDGE.

THE ENTITLED PETITION WAS APPLIED FOR CERTIORARI TO THE UNITED STATES SUPREME COURT AND RETURNED, RECEIVED SIGNED FOR 12-28-06, ESTERLING COR.FAC. DORM 7 SIGNED FOR ON INSTITUTIONAL LOG.PETITIONER OBJECTED TO THIS CLERK REFUSING TO FILE AND ACCEPR THIS ACTION AS UNCONSTITUTIONAL, AND ALLEGING THAT THE HIGHEST STATE, FEDERAL COURTS OF ALABAMA, ELEVENTH CIRCUIT, FOR HABEAS CORPUS IN HEARING MY APPEAL WAS DENIED. A CONTROVERSY, HAD BEFORE IT TRANSCRIPTS OF TRIAL PROCEEDINGS . (T.R. 386)(CORRECTED PAGE 386) THAT WAS HELD BACK FROM THE COURTS REVIEW, OR KNOWLEDGE OR IGNORED OF TRIAL PROCEEDINGS CC-98-1095 FRAUDULENTLY PREPARED BY THE PROSECUTOR GAIL MEEKS, NICK ABBOTT AND THE COURT REPORTER:[T.R.386:APPENDIX B#3] TRIAL RECORD 680 ;THE SAME THING HAPPENED IN **DAVIS V. ZANT** 36 F. 3d 1538 at1546 [11]; AND POSSIBLY CORINNE T. HURST, CLERK,.IN LOVING V. UNITED STATES (1996) 517 US 748, 135 L Ed. 2d 36, 116 S.Ct. 1737; RASUL V. BUSH (2004) 159 L Ed 2d 548; THE COURT CONCLUDED THAT ANY PERSON , INCLUDING AN ENEMY ALIAN, DEPRIVED OF HIS LIBERTY IN EISENTRAGER, 329 US at 767, 94 L ed 1255, 70 S Ct 936 --ANYWHERE UNDER ANY PURPORTED AUTHORITY OF THE UNITED STATES IS ENTITLED TO THE WRIT IF HE CAN SHOW THAT EXTENSION TO HIS CASE OF ANY CONSTITUTIONAL RIGHTS OR LIMITATIONS WOULD SHOW HIS IMPRISONMENT ILLEGAL: [AND] THAT. COURTS MUST BE HELD TO POSSESS STATUTORY JURISDICTION AS PART OF THE JUDICIAL POWER OF THE UNITED STATES.

PETITIONER HAS A CONSTITUTIONAL RIGHT TO HABEAS CORPUS SECURED BY THE SUSPENSION CLAUSE, U.S. CONST. ART. I, § 9, cl. 2, REASONING THAT, "IF A PERSON HAS A RIGHT TO A WRIT OF HABEAS CORPUS, HE CANNOT BE DEPRIVED OF THE PRIVILEGE BY AN OMISSION IN A FEDERAL JURISDICTIONAL STATUTE," EISENTRAGER V. FORRESTAL, 174 F. 2d, at 965. THE GREAT WRITS "ABILITY TO CUT THROUGH BARRIERS OF FORM AND PROCEDURAL MAZES," HARRIS, 394 US, at 291, 22 L ed 2d 281, 89 S Ct 1082; PROPER RESPONDENT IS THE PERSON "GWYNDOLIN MOSLEY, WARDEN EXERCISING THE LEGAL REALITY OF CONTROL OVER THE PETITIONER SUFFERS FROM THE SAME LOGICAL FLAW. PADILLA V. RUMSFELD 352 F. 3d 695 at 705, 707 (2nd cir. 2003):28 USC § 2242 [28 USCS § 2242]; SEE ALSO § 2243 (THE WRIT, OR ORDER TO SHOW CAUSE SHALL BE DIRECTED TO THE PERSON HAVING CUSTODY OF THE PERSON DETAINED"): FAY V. NOIA 372 US 391, 9 L ed 2d 837, 83 S Ct 822; [*372 US 421] CHESSMAN V. TEETS (1955) 350 US 3, 100 L ed 4, 76 S Ct 34.

REASONS FOR GRANTING THE WRIT :

PETITIONER CLAIMS THAT THE [AEDPA] UNCONSTITUTIONALLY RESTRICTS THIS COURTS JURISDICTION, IS A LEGISLATIVE ACT, IN ANY FORM, THAT APPLIES " EITHER TO NAMED INDIVIDUALS OR TO EASILY ASCERTAINABLE MEMBERS OF A GROUP AS PETITIONER [A PRISONER] IN SUCH A WAY AS TO INFLICT PUNISHMENT WITHOUT A JUDICIAL TRIAL. CARMELL V. TEXAS (2000) 529 US 513, 146 L Ed 2d 577 at 597, 120 S Ct 1620; EX POST FACTO LAWS, [529 US 538].

A BILL OF ATTAINDER IS A LEGISLATIVE ACT WHICH INFLICTS PUNISHMENT WITHOUT JUDICIAL TRIAL...[L]EGISLATIVE ACTS, NO MATTER WHAT THEIR FORM,, THAT APPLY EITHER TO NAMED INDIVIDUALS OR TO EASILY ASCERTAINABLE MEMBERS OF A GROUP IN SUCH A WAY AS TO INFLICT PUNISHMENT ON THEM WITHOUT A JUDICIAL TRIAL ARE BILLS OF ATTAINDER PROHIBITED BY THE CONSTITUTION . UNITED STATES V. LOVETT, 328 US 303, 315-316, 90 L ed 1252, 66 S ct 1073 (1946)(internal quotation marks omitted). THE PROHIBITIONS ON EX POST FACTO LAWS AND ON BILLS OF ATTAINDER ARE OBVIOUSLY CLOSELY RELATED. SEE E.G..FLETCHER V. peck, 6 CRANCH 87, 138-139, 3 L Ed 162 (1810); CAL. DEPT. OF CORRECTIONS V. MORALES (1995) 514 US 499, 131 L Ed 2d 588 at 604, 115 S Ct 1547; GARMER V. JONES (2000) 529 US 244, 146 L ed 2d 236 at 248, 120 S Ct 1392;AND AN EX POST FACTO , BOUIE V. COLUMBIA ,378 US 347, 12 L ed 2d 894, 84 S ct 1697 ; THOMPSON V. UTAH , 170 US 343, 42 L Ed 1061, 18 S ct 620; CALDER V. BULL (US) 3 DA11 386, 1L ed 648.

THE STATUTE AT BAR IS SO BROAD AND DISCRIMINATIVE IN ITS REACH AS TO BE UNCONSTITUTIONAL UNDER THE FIFTH AMENDMENT ALONE. APTHEKER V. SECRETARY OF STATE, 378 US 500, 12 L ed 2d 992, 84 S ct 1659; SHELTON C TUCKER, 364 US 479, 5 L ed 2d 231, 81 S ct 247;KANSAS V KENDRICKS (1997) 521 US 346, 138 L ed 2d 501 at 526, 117 S ct 2072.

ABUSE OF 2: PETITIONER ALLEGES THAT THERE ARE CIRCUMSTANCES PRESENT IN THIS CASE WHICH " WOULD" ENTITLE [SUNDAY] TO RELIEF. PETITIONER IS WITH PERSONAL KNOWLEDGE OR INFORMATION SUFFICIENT TO FORM A BELIEF AS TO APPEAL FROM LEE COUNTY COUNTY VIRVUIT COURTS DECISIONS " CC 98-1095 : ALABAMA COURT OF CRIM. APP. DECISION CR-01-0207: IS AN ABUSE OF DISCRETION AND PRISONER HAS NOT HAD ADEQUATE ACCESS TO THE COURTS THROUGHOUT HIS INCARCERATION. AS TO EXH. # 1, CC-98-1095, CIV. ACT. NO. 03-T-502-E, THE COURT ABUSED ITS DISCRETION, DENIED APPEAL ON THE MERITS, violating 5 U.S.C. § 706 AND 28 U.S.C. § 1343 CIV. RIGHTS AND selective franchise, THE PETITIONER IN THE DISTRICT COURTS SHALL HAVE ORIGINAL JURISDICTION OF ALL CIVIL ACTIONS ARISING UNDER THE CONSTITUTION, LAWS OR TREATIES OF THE UNITED STATES , SEE 28 U.S.C. § 1985; § 1986. AS TO CIVIL NO. 03-T-502-E, THE PLEADING FILED BY [SUNDAY] ON FEB. 2, 2004, in which the court construes as motion to amend petition wherein petitioner asserts additional claims in support of his petition for relief, and for good cause. IT WAS ORDERED BY THE FED. MAG THAT : -- THE MOTION TO AMEND IS GRANTED--[SEE AMENDED PETITION]. AS [SUNDAY] ALSO ALLEGES TO THIS COURT. MAJ. VANZETTA PENN , cPERSON, US DISTRICT JUDGE MYRON THOMPSON DENIED REVIEW ON THE MERITS OF CLAIMS PRESENTED. HE AUTHORED A ONE PAGE OPINION OF CIVIL ACTION NO. 03-T- 502-E. THE RELIEF ALONE WAS INADEQUATE TO RESOLVE CONTROVERSY BETWEEN THE PARTIES." FERRELL, ET AL RESPONDENTS FEARED FURTHER LITIGATION BY "[MR. SUNDAY].

ACCORDINGLY SUNDAY PURSUED COMPLAINTS DEPOSITED INTO THE UNITED STATES DISTRICT COURT AND 1-20-04 CIV. ACT.03-T-502-EE,' opposition to said recommendations of magistrate ' mcPHERSON, OBJECTIONS MADE IDENTIFYING FINDINGS IN THE RECOMMENDATION OBJECTED TO AS REQUIRED BY LAW.THE PRITIONER EXERCISED IN DISCOVERY," FED.RULE of civ. proc. 26 (b)(1) AND 33 AND PETITIONER SHOWS GOOD CAUSE FOR EXAMINATION. SCHLAGENHAUS V. HOLDER 379 U.S. 104, 118 (1964):SWINT V. CHAMBERS COUNTY COMMISSION(1995) 514 US 35, 131 L.Ed 2d 60, 115 S CT 1203 : FERNANDEZ-ROQUE V. SMITH 671 F. 2d 426 (1982) AT 431 'supra';

3; PETITIONER OBJECTS TO THE MAGISTRATES FINDINGS. SEE 28 § 636(b)(1)(C): LEWIS V. SMITH 855 F. 2d 736, 738 (11th cir. 1988); nettles v. wainwright 677 F. 2d 404 (5th Cir. unit b 1982)(en banc).

4: PETITIONER LISTED PARTIES WHO HAS INFORMATION ABOUT LAWSUIT COMPLAINTS APPEAL. IN DISCLOSURE (A) AND DISCLOSURE (B) PROVIDING MORE INFORMATION EVIDENCE. FED. R. CIV. PRO. 26 (A)(1).

5: PETITIONER SEEKS REVIEW OF THE DISTRICT COURTS CORDERS IN DENOVO DETERMINATION BY THE DISTRICT JUDGE, OF THE FACTUAL FINDINGS OF THE MAGISTRATE 28 U.S.C. § 636(b)(1)(C):LEWIS V. SMITH," SUPRA, : NETTLES V. WAINWRIGHT " SUPRA".

6; PETITIONER ALLEGES THAT TAPES AND ORIGINAL RECORDS IN THIS CASE ARE ADEQAUTE FOR PURPOSES OF REVIEW. PURSUANT TO 28 U.S.C. § 1915 AND FED. R. CIV. P. 72(b), PETITIONER OBJECTS ACCORDINGLY, BUT IS UNABLE TO PAY THE FEE FOR A TRANSCRIPT, AND RESPECTFULLY BRINGS THIS TO THE ATTENTION OF THE COURT FOR A JUDICIAL DETERMINATION THAT TRANSCRIPTION IS NECESSARY, REQUIRED FOR AN ADEQUATE REVIEW, BEFORE THE UNITED STATES FOR ORDER TO PAY THE COSTS OF THE TRANSCRIPTS.

7: THE FEDERAL ISSUES PRESENTED WERE RAISED AND RULED ON BELOW OR PORTIONS THEREOF STATE CLAIMS UNDER WHICH RELIEF CAN BE GRANTED. THE EVIDENTIARY RULINGS ARE SO PREJUDICIAL AS TO DENY DUE PROCESS OR SOME OTHER CONSTITUTIONAL RIGHT. URGUHART V. LOCKHART 726 F. 2d 1316 (8th Cir. 1984);u.s. v. vallery 108 F. 3d 155 (8th cir. 1997):

8; EACH OF THE ISSUES PRESENTED BY [SUNDAY] WAS EXPRESSLY RAISED IN THE COURTS BELOW. " PETITION CC?_(cc-98-1095: TRIAL COURT PETITON [CR-01-0207] COURT OF CRIM. AP.; PETITION FOR WRIT OF CERT.

'020562 FILED 1-28-03: CIV. ACT. 03-T- 502-E EXECUTED AT EASTERLING COR. FAC. ON 3rd DAY JULY, 2003,: CC-98-1095 INTRODUCTION: EXH. NO. I(i) CC-98-1095, QUESTION PRESENTED, EXH.I(i) CC 98-1095 LEGAL CLAIM I(i), ISSUE ARGUMENT I(A): CIV. ACT . 03-T- 502-E, OPPOSITION OF RESPONDENTS ANSWER TO COURTS ORDER -9-

TO SHOW CAUSE. VANZETTA PENN Mcpherson.

9: AS NOTE ABOVE, THE COURT DID NOT EXPRESSLY RULE ON PETITIONERS FEDERAL CLAIMS. BECAUSE THE JUDGMENT NECESSARILY REJECTS THOSE FEDERAL CLAIMS, THE MERITS, HOWEVER, THOSE FEDERAL QUESTIONS ARE SQUARLY PRESENTED HERE. THE DISTRICT COURTS SHALL HAVE ORIGINAL JURISDICTION OF ALL CIVIL ACTIONS ARISING UNDER THE CONSTITUTION, LAWS OR TREATIES OF THE UNITED STATES 28 USC§ 1331.

10: FEW ISSUES COULD BE MORE IMPORTANT THAN THE ISSUES PRESENTED IN THIS CASE. AT STAKE IS THE LAWFUL RESOLUTION OF AN INNOCENT MAN. A MAN ACTUALLY INNOCENT. SEE MURAY V. CARRIER 477 U.S. 478, 496, 106 S.Ct. 2634,2649-50, 91 L. ed 2d 397 (1985):SMITH V. MURRAY 477 U.S. 527, 106 S.Ct. 2661,2667-68, 91 L. ed 2d 434 (1986): SHLUP V. DELO 513 US 298, 320, 130 L.Ed. 2d 808, 115 S.Ct. 851 (1995): McCOY V. NORRIS, 958 F. SUPP. 420 (E.D.ARK. 1996): SAWYER V. COLLINS 494 U.S. 1025, 108 L Ed 2d 606, 110 S CT 1468,(1990): SELVAGE V. COLLINS 494 US 108,108 L Ed 2d 93, 110 S CT 974 (1990):BOUSELY V. UNITED STATES 523 U.S. _____, 140 L.Ed. 2d 828, 118 S Ct _____(1998) (CASE IS TORN OUT OF BOOK): DUGGER V. ADAMS 489 U.S. at 401,411 n.6, 109 S.Ct. 1217 n. 6, 103 2d 435 (1989): U.S. V. McKIE, 73 F. 3d 114, (D.C.CIR. 1996): BARDEN V. KEOHANE 921 F. 2d 476 (3rd Cir. 1990);U.S. V. SHAIK 916 F. 2d 984 (5th cir. 1990): EWING V. McMAHIN 799 F. 2d 1143 (6th Cir.1986);GONZALEZ V. ABBOTT 967 F. 2d 1499 (11th Cir.1992);

ACTUAL INNOCENCE" BONEGO V. U.S. 975 F. Supp. 520 (S.D.N.Y. 1997); DUGGER V. ADAMS 489 U.S. at 401,411 n.6, 109 S. Ct. 1211,1217 n. 6, 103 L ed. 2d 435 (1989); U.S. V. MAYBECK 23 F. 3d 888 (4th cir. 94); HENDERSON V. SARGENT, 926 F. 2d 706 (8th Cir. 91): JONES V. ARKANSAS '929 F. 2d 375, 381 (8th Cir. 91):

11: IN THE EXCEPTIONAL CIRCUMSTANCES OF THIS CASE, CONTRARY TO RESPONDENTS ALLEGATIONS, RULE 60 (b) RELIEF IS APPROPRIATE AND OFFENDS NO STATUTORY PROSCRIPTION OR POLICY CONCERN AGAINST SECOND OR SUCCESSIVE HABEAS PETITIONS. THE COURT SHOULD VACATE THE DECISION BELOW AND REMAND TO THE DISTRICT COURT WITH DIRECTION, TO GRANT PETITIONERS 60 (b) MOTION SO THAT HIS PROPERLY PRESENTED CLAIMS , PROSECUTORIAL MISCONDUCT CAN BE HEARD ON THE MERITS AND REVIEWED BY A FEDERAL COURT: KNOWING USE OF PERJURED TESTIMONY BY THE PROSECUTOR, STATE OF ALABAMA, RESPONDENTS. ANY PRIOPER EXERCISE OF RULE 60(b) DISCRETION WOULD REQUIRE RELIEF FROM THE DISTRICT COURTS JUDGMENT. THE FACT THAT A 60(b) MOTION CANNOT BE VIEWED AS THE FUNCTIONAL EQUIVALENT OF A SUCCESSIVE APPLICATION. THIS CASE IS THE RARE CASE IN WHICH A 60(b) MOTION RAISING NO ISSUE OUTSIDE THE FOUR CORNERS OF THE ORIGINAL HABEAS APPLICATION DOES MEET 60 (b) CRITERIA, AND INDEED COMPELS AN EXERCISE OF DISCRETION TO REOPEN THE JUDGMENT. IT DOES SO FOR THE FOLLOWING CONSTELLATION OF EXTRAORDINARY REASONS.

the district court never exercised rule 60 (b) DISCRETION. A REMAND TO THE DISTRICT COURT TO EXERCISE DISCRETION " IN THE FIRST INSTANCE IS REQUIRED, HOWEVER, BECAUSE THE PROPER OUTCOME IS CLEAR. CF. BRILLHART V. EXCESS INS. CO. 316 U.S. 491, 496 (1942).

THE JUDGMENT THAT PETITIONER SEEKS TO REOPEN IS BASED ENTIRELY ON A PROCEDURAL IMPEDIMENT THAT PREVENTED THE DISTRICT COURT FROM ADDRESSING THE CONSTITUTIONAL MERITS OF SUBSTANTIAL CLAIMS OF EGREGIOUS PROSECUTORIAL MISCONDUCT [R.680][R.383 -386]: SEE 39 (K) motion , 'case number cr-99-1045 ON APPEAL FROM THE CIRCUIT COURT OF LEE COUNTY, ALABAMA, CASE NUMBER CC-98-1095 FILED BY T. ROBIN McINTYRE, ATTORNEY FOR DEFENDANT, THAT WAS HELD BACK OR HIDDEN, MISREPRESENTED TO AND FROM THE COURTS REVIEW, CORRECTED PAGE 386 from LINE 22 to 25 SHOULD BE AS FOLLOWS: LINE. 22: "Q" OKAY 23; A. THEY WAS STILL TELLING ME --- THEY WERE TELLING ME AT THE TABLE. I WAS KIND OF EMBARRASSED. 24: "Q" OKAY I KNOW. I KNOW ITS HARD CINDY. DO YOU REALLY REMEMBER WHAT HAPPENED ?[SEE EXH. S-III OF CIV. ACT 03-T-502 -E IN THE DISTRICT COURT , [T.R. 680, CC-98-1095].

12: RESPONDENT DOES NOT DISPUTE THE SERIOUSNESS OF PETITIONERS PROSECUTORIAL MISCONDUCT CLAIMS.[CIV. ACT 03-T-502-E: CC-98-1095]. THE QUESTION THE EFFECT OF [R.680, 386] THE MISCONDUCT THEY DONT DISPUTE THAT IT OCCURRED. EXH. #1 CC-98-1095.

BUT IN DOING SO THEY REFUSED TO HIGHLIGHT HOW SERIOUSLY THE VIOATION CORRUPTED THE PENALTY PHASE VERDICT. CF. SEMTEK INT'L INC. V. LOCKHEED CORP. 531 U.S.492, 501-02 (2001)(AND ONLY A JUDGMENT THAT PASSES DIRECTLY ON THE SUBSTANCE OF [A PARTICULAR] CLAIM, TRIGGERS THE DOCTRINE OF RESJUDICATA AND ITS FULL RANGE OF FINALITY INTERESTS): SLACK, 529 U.S. at 483 (THE WRIT OF HABEAS CORPUS PLAYS A VITAL ROLE IN PROTECTING CONSTITUTIONAL RIGHTS, AND CONGRESS [HAS] EXPRESSED NO INTENTION TO ALLOW [DISTRICT] court PROCEDURAL ERROR.

WHERE THE DISTRICT COURT [ERRONEOUSLY] RELIES ON PROCEDURAL GROUNDS TO DISMISS THE PETITION, 'TO BAR VINDICATION OF SUBSTANTIAL CONSTITUTIONAL RIGHTS. SEE JUNE 23rd, 2003," JOHN M. PORTER ASSISTANT ATTORNEY GENERAL. RESPONDENTS ANSWER TO COURTS ORDER TO SHOW CAUSE IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA 03-T-502-E, SEE EXH. I(i) CC 98-1095.

PETITIONER ARGUES THAT THE DISTRICT COURTS, STATE, IS CONTRARY OR INVOLVE AN UNREASONABLE APPLICATION OF FEDERAL LAW AS DETERMINED BY THE UNITED STATES SUPREME COURT. WILLIAMS V. TAYLOR (2000) 146 L. Ed. 2d 389 at 425,427;

12: THE MERITS OF THE FACTUAL DISPUTE WERE NOT RESOLVED: SEE PETITION ,NO:03-T-502-E; amendment ' wheter trial court commit reversible error, when the court admitted CYNTHIA THROWERS IN COURT IDENTIFICATION OF THE DEFENDANT (III) STATEMENT OF THE FACTS PAGE (II) THROUGHOUT (XIII). SEE SUMNER V. MATA, 455 u.s. 592, 597 (1982;

13: AS THE CLAIM TURNS UPON THE FACTS, THE TESTI,ONY AT THE TRIAL REGARDING THE DEFENDANT AND THE IDENTIFICATION, SECONDARY FACTS BY WHICH A PRINCIPLE FACT MAY BE RATIONALLY INFERRED: THE ALLEGED VICTIM TESTIFIED AT TRIAL IN CASE CC-98-1095 THAT: PEOPLE TOLD HER WHAT TO SAY ABOUT TIMMY [SUNDAY]. TOLD HER WHAT TO TELL DEFENSE COUNSEL, THE COURT AND THE JURY.

14: CLAIM I(i) PETITIONERS CONVICTION WAS OBTAINED AS A RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL, AS GUARANTEED BY THE UNITED STATES CONSTITUTION, FIFTH, FOURTEENTH AMENDMENTS, SIXTH THERETO. STRICKLAND V. WASHINGTON 466 U.S. 668 (1984):

TRIAL COUNSEL MR. JEFF TICKAL WAS INEFFECTIVE FOR FAILING TO OBJECT AND PRESERVE FOR DIRECT REVIEW THE ASSISTANT DISTRICT ATTORNEY GAIL MEEKS KNOWING USE OF PERJURED TESTIMONY. BECAUSE THE RECORD CONTAINS EVIDENCE THAT THE PROSECUTOR KNOWINGLY USED PERJURED TESTIMONY TO OBTAIN A CONVICTION (R. 383) CC-98-1095 OR THAT THE PERJURED TESTIMONY WAS ON A MATTER OF SUCH IMPORTANCE THAT THE NEWLY DISCOVERED EVIDENCE (R.386, 680) CC-98-1095 WOULD HAVE PREVENTED A CONVICTION, THIS COURT SHOULD FIND TRIAL COURT ABUSED ITS DISCRETION IN DENYING [SUNDAYS] RULE 32, POST CONVICTION APPLICATION. 5 USC § 706.

VISABLE FROM THE SWORN TESTIMONY, IT IS CLEAR, THE CLERK RECORD 0022; PG. -2- OF THE SUPPORTING FACTS FOR CLAIM NO.I(i) FILED JULY, 2001 IN OFFICE CORINNE T. HURST CIRCUIT CLERK OF THE LEE COUNTY COURTS CASE UNDER ATTACK # CC-98-1095.

ADDITIONALLY, THOUGH NOT MENTIONED BY RESPONDENTS, ASSISTANT ATTORNEY GEN. "MR. JOHN M. PORTER, [CYNTHIA] SHE TESTIFIED AT RULE 39(K) MOTION CC-98-1095 FILED BY ATTORNEY ROBYN MCINTYRE CASE CC-98-1045, PAGE 386 FROM LINE 22 to 25 ³CORRECTED PAGE 386 kept back from the courts review or misrepresented by respondents committing fraud upon the court. see appendix #

B #3, "Exh. 9-III CIVACT. 03-7-502-6"

13: PETITIONERS 60(b) MOTION REASSERTS CLAIMS FOR HABEAS CORPUS RELIEF THAT WERE PRESENTED IN HIS ORIGINAL PETITION. THE MOTION EXPRESSLY RELIES ON EVIDENCE ... IN THE ... RECORD CASE # CC-98-1095 OF THE ORIGINAL PROCEEDING AND THE BASIS FOR 60(b) MOTION OF THE RULES OF FEDERAL PROCEDURE.

IN CHESSMAN V. TEETS (19550 350 U.S. 3, 100 L. Ed.4, 76 S. Ct. 34; IT APPEARED THAT ONE OF CRIME IN A CALIFORNIA COURT PETITIONED A FEDERAL COURT FOR HABEAS ALLEGING THAT THE HIGHEST CALIFORNIA COURT, IN HEARING HIS APPEAL HAD BEFORE IT A TRANSCRIPT OF THE TRIAL PROCEEDINGS WHICH HAD BEEN FRAUDULENTLY PREPARED BY THE PROSECUTING ATTORNEY AND THE COURT REPORTER. THE DISTRICT COURT SUMMARILY DISMISSED THE APPLICATION AND THE COURT OF APPEALS FOR THE NIN TH CIRCUIT AFFIRMED. ON CERTIORARI

FIVE MEMBERS OF THE SUPREME COURT, REED, BURTON AND CLARK, JJ, DISSENTED WITHOUT OPINION, WARREN, CH. J. DID NOT PARTICIPATE, IN PER CURIAM OPINION, REVERSED THE JUDGMENT OF THE COURT OF APPEALS AND REMANDED THE CASE TO THE DISTRICT COURT FOR A HEARING. IT WAS STATED THAT, WITHOUT INTIMATING ANY OPINION REGARDING THE VALIDITY OF THE PETITIONERS CLAIM, IN THE CIRCUMSTANCES DISCLOSED BY THE RECORD THE PETITION SHOULD NOT HAVE BEEN SUMMARILY DISMISSED.

THE COURT IN PRICE V. JOHNSTON (1948) 334 US 266, 92 L. Ed. 1356, 68 S Ct 1049, HELD THAT A DISTRICT COURT ERRED IN DISMISSING , WITHOUT A HEARING, A PETITION FOR HABEAS CORPUS FILED BY ONE CONVICTED OF CRIME IN A FEDERAL COURT. WHERE ALTHOUGH IT APPEARED THAT THREE EARLIER PETITIONS FOR HABEAS CORPUS BY THE SAME PETITIONER HAD BEEN DENIED, THE FOURTH PETITION CONTAINED THE ALLEGATION THAT THE PETITIONERS CONVICTION WAS OBTAINED BY TESTIMONY WHICH THE PROSECUTION KNEW TO BE FALSE, THIS CONTENTION WAS NOT MADE IN THE THREE EARLIER PETITIONS, AND ALTHOUGH PETITIONER KNEW, AT THE TIME HE MADE THE EARLIER PETITIONS, THAT THE SINGLE WITNESS FOR THE PROSECUTION HAD CHRGED^A HIS TESTIMONY AFTER CONFERENCE WITH THE PROSECUTING ATTORNEY, IT DIDNOT APPEAR EITHER^F THAT HE THEN KNEW THAT THE CHANGED TESTIMONY TO BE FALSE, OR THAT THERE WERE NO ADEQUATE REASONS FOR NOT MAKING THE ALLEGATIONS EARLIER (SUCH AS UNAWARENESS OF THE SIGNIFICANCE OF THE RELEVANT FACTS).

15: THE PETITIONS FOR LEAVE TO APPEAL STATE SPECIFIC OBJECTIONS TO THE JUDGMENT CC98-1095' CIV.ACT. 03-T- 502-E REGARDING CIRCUMSTANCES PRESENT IN THIS CASE WHICH ENTITLE [SUNDAY] IN THE INTEREST OF JUSTICE. SPECIAL CIRCUMSTANCES EXIST THAT THE ONE YEAR TIMELINE RESPONDENTS ALLEGE IN RECOMMENDATION OF THE MAGISTRATE JUDGE PG. #3. THE STATE CREATED AN IMPEDIMENT (OBSTRUCTION OR HINDERENCE) IN VIOLATION OF THE CONSTITUTION OR LAWS OF THE UNITED STATES THAT PREVENTED PETITIONER FROM FILING THE APPLICATION OR MOTIONS, IN HIS HABEAS CORPUS PETITION BECOMES DUE ONE YEAR AFTER THE UNCONSTITUTIONAL OR ILLEGAL IMPEDIMENT WAS REMOVED. 28 U.S.C. § 2244 (d)(1)(B)(2000). EXAMPLE:

[i]: THE STATES WITHHOLDING OF EXCULPATORY EVIDENCE : APP. #. APPENDIX B #3; Exh-S-12 03-T-502-E; APP. III & IV. :

IN VIOLATION OF BRADY V. MARYLAND, 373 U.S. 83, 83 S. Ct. 2531, 10 L. Ed. 2d 215 (1963): SEE EDMOND V. UNITED STATES ATTORNEY 959 F. Supp. 1,4 (D.D.C.1997);

[ii]: THE STATE CREATED IMPEDIMENT MAY BE INADEQUATE PRISON LIBRARIES. SEE WHALEM/HUNT V. EARLY 233 F. 3d 1146 (9th Cir. 2000)(remanding case for evidentiary hearing as to whether petitioners claim that an unconstitutional impediment existed because of lack of information in the prison law library may be upheld). where state prison authorities, in violation of equal protection clause of fourteenth amendment, frustrated prisoners attempt to file timely appeal from his conviction, federal district court in habeas corpus proceedings should enter such orders as are appropriate --

TO ALLOW STATE REASONABLE TIME IN WHICH TO AFFORD PRISONER FULL PPELLATE REVIEW HE SHOULD HAVE RECIEVED DUT FOR FRUSTRATION OF HIS APPEAL, FAILING WHICH HE SHALL BE DISCHARGED. DOWD V. UNITED STATES (1951) 340 U.S. 206, 95 L.ed. 215, 71 S Ct. 262, 19 ALR 784.

THE PETITIONS FOR APPEAL STATE SPECIFIC OBJECTIONS TO THE JUDGMENT, REGARDING INJURUES HE RECEIVE FROM PRISON OFFICIALS DURING HIS ACCESS TO APPEAL, TO COURT, RESOURCES, AND CASES WERE DISMISSED. THE LAW LIBRARY ACCESS WAS WOEFULLY INADEQUATE, MALFUNCTIONING TYPEWRITERS. LAW LIBRARY SUPERINTENDENT OFFICER GAVINS PLACED UNEQUAL TREATMENT TO PETITIONER AN INMATE. SEE BOUNDS V. SMITH 430 US 817,823, 97 S. Ct. 1491, 1495, 52 L. ed 2d 72,79 (1977); MANN V. SMITH 796 F. 2d 79 ,83-85 (5th Cir.86): WILLIAMS V. LEOKE 584 F. 2 1336, 1340 (4th Cir. 78) CERT. DENIED 442 U.S. 9111 (1979); STRAUB V. MUNGE 815 F. 2d 1467, 1470 (11th Cir. 87); GILMORE V. LYNCH 319 F. Supp.105,111 (N.D.Cal.70): KNOP V. JOHNSON 977 F. 2d 996 , 1000(6th Cir. 92): BONNER V. CITY OF PRITHARD ALA. 661 F. 2d 1206, 1212-13 (11th Cir. 81): WOLFF V. McDONNELL 418 U.S. 539, 579, 94 S. Ct. 2963 (1974): PETERKIN V. JEFFES 855 F. 2d at 1037 : JACKSON V. PROCUNIER 789 F. 2d 307, 311 (5th Cir. 81): COFIELD V. ALABAMA PUBLIC SERVICK COMMISSION 936 F. 2d 512, 517 (11th Cir. 91);

[SUNDAY], PRISONER IN SEG, DURING HIS APPEAL PROCESS AT THE TIME OF FILINGS WERE SUPPOSED TO HAVE ACCESS TO THE LAW LIBRARY.

HOWEVER, ONCE OR TWICE A WEEK WERE DELIVERED TWO BOOKS FROMM MARH 3, 2006 TO APRIL 17 [RECOMENDATION pg.#2].

16; PETITIONER REQUESTED EXIGENTLY AN INK PEN TO WRITE CERTIORARI AND OFFICER GAVINS DENIED REQUEST, THEREFORE PETITIONER DID NOT HAVE WRITING RESOURCES TO ANSWER PETITIONS, APPLICATIONS TO THE COURT SYSTEM TO APPEAL, AND WAS DENIED FILING BECAUSE OF OUT OF TIME. PETITIONER FILED NUMEROUS REQUESTS, COMPLAINTS ADDRESSED TO OFFICER GAVINS, HIS UNCLE CAPT. SCONYERS COMPLAINTS OF FACING COURT DEADLINES AND OF BEING DENIED ACCESS TO THE LAW LIBRARY AND RESOURCES TO ANSWER AND PRESENT APPLICATIONS TO APPEAL. PETITIONER ADVISED OFFICER GAVINS OF LEGAL PROCEEDINGS, ACCESS, RE SOURCES NEEDED. GRIEVANCES FILED SINCE MAY 20, 2003 [WHEN SUNDAYS 1st HABEAS CORPUS PETITION WAS GRANTED ACCES INFORMA PAUPERIS, [SUNDAY ARRIVED AT EASTERLING CORRECTIONAL FACILITY AND ALL HAVE BEEN UNANSWERED AND PETITIONER HAS BEEN DENIED ADEQUATE ACCES TO THE COURTS, IMPOSED , IMPEDED BY ACTIONS OF SUCH PRISON OFFICIAL MISCONDUCT, AS [SUNDAY[PLEAS TO THIS HONORABLE COURT ACTUAL INOCENSE, OF BEING VICTIM OF A FUNDAMENTAL MISCARRIAGE OF JUSTICE AND PRESENTS CIRCUMSTANCES, FRUSTRATED OR IMPEDED IN PURSUING NONFRIVOLOUS CLAIMS BECAUSE OF THESE INADEQUACIES. " SEE THE RECORD: SEE LEWIS V. CASEY, 518 U.S. 343, 349 , 116 S. Ct. 2174,2179, 135 L. Ed. 2d 606, 616 (1996), 351 Id; STATE HAS NOT FULFILLED ITS DUTY BY PROVIDING PETITIONER WITH LEGAL RESOURCES, MATERIALS PERTAINING TO STATE IN WHICH CONVICTION WAS DECIDED. SEE eg.CANY V. FARRELLY 957 F. Supp. 727, 741-42 (D.V. 1997).

17; THE MAIL PROCEEDING SYSTEM AT THE PRISON WAS WOEFULLY INADEQUATE. MAIL WAS FREQUENTLY LOST OR MISPLACED, RETURNED TO SENDER. PETITIONER RECEIVED MAIL WITH COURT DOCUMENTS CUT IN PIECES, UNREADABLE, ENVELOPES MARKED RECEIVED WITH THE DATE OF ALMOST TWO MONTHS BEFORE STAMPED ON THEM.[SUNDAYS] COURT ORDERS WERE RETURNED TO THE ELEVENTH CIRCUIT COURT OF APPEALS SAYING INMATE EXPIRED, COURT ORDERED PETITIONER TO RESPOND WITHIN 14 DAYS, OR BE DISMISSED. SUNDAY SIGNED FOR LEGAL DOCUMENTS ON OR AROUND APRIL12, ORDERED MARCH? 3, AROUND 42 days after order . prison logs or other records evidence delivery by prison authorities the day [SUNDAY] SIGNED AND RECEIVED. WASHINGTON V. UNITED STATES 243 F. 3d 1299, 1301 (11th Cir. 2001);GRVEY V. VAUGHN 993 F. 2d 776 , 780 (11th Cir. 93):ADAMS V. UNITED STATES 173 F. 3d 1339, 1340-41(11th Cir. 99): HOUSTON V. LACK 487 U.S. 266, 271-272 (1988).

18: PETITIONER [SUNDAY] HAS SUFFERED EXTREME EMPTIONAL HARM AND DEPRESSION, EMBRACING ALL FORMS OF MENTAL PAIN, INCLUDING DEEP GRIEF, DISTRESS, ANXIETY AND FRIGHT. THE LOSS OF ACTIONS IN THE ELEVENTH CIRCUIT COURT OF APPEALS, THE UNITED STATES SUPREME COURT REFUSING TO FILE APPEAL BECAUSE PETITIONER WAS OUT OF TIME, BECAUSE OFFICER GAVINS WOULD NOT PROVIDE AN INK PEN TO WRITE APPEAL WHEN REQUESTED,. THE ABOVE COURTS, HAVE HELD THAT THE RIGHT OF ACCESS TO THE COURTS INCLUDES PROVIDING INDIGENT PRISONERS WITH PAPER AND PEN TO DRAFT LEGAL DOCUMENTS, WITH SERVECES OF A NOTARY TO AUTHENTICATE THEM, AND WITH STAMPS TO MAIL THEM. BOUNDS V. SMITH 430 U.S. 817, 824-25, 97 S.Ct.1491,1496, 52 L. Ed. 2d 72, 81 (1977).

CONCLUSION

APPLICATION TO APPEAL SHOULD BE GRANTED AND FORE THE FORGOING REASONS IS NOT A @ND AND SUCCESIVE PETITION.

CERTIFICATE OF SERVICE

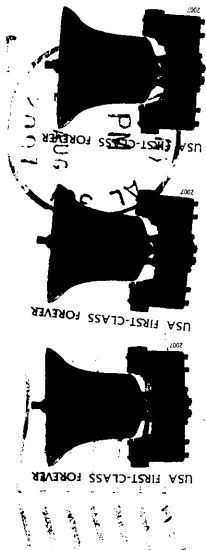
I HEREBY CERTIFY THE ABOVE INSTRUMENTS MAILED
DEPOSITED IN THE UNITED STATES POSTAL SERVICE TO
RESPONDENT STATE OF ALABAMA, AND THE COURT THIS THE 23rd
DAY OF AUGUST 2007.
PURSUANT TO TITLE 28 UNITED STATES CODE SERVICE I
DECLARE UNDER SECTION 1746.

Tim Sunday

TIMOTHY LEE SUNDAY , INCARCERATED PETITIONER PRO SE.

Timothy Lee SUNDAY #213453
Easterling Con. Fd. DI-45-A
200 Wallace Drive
Clifton 36107

This correspondence is forwarded from an
Alabama (State Prison) Tim Lee Sunday was not born
excluded, and the information was not in the
correction is not information for the substance
of content of the enclosed correspondence.
LA 52 3:07-CV-00723-MEF-WC



Office of The Clerk
United States District Court
P.O. Box 711
Montgomery, Alabama 36101-
0711

1 Q That is Tim. But you told me this morning the other
2 fellow -- are you sure?

3 A Yes, I am sure.

4 Q Okay. But you told me this morning the other fellow
5 was Timothy Sunday.

6 A Yes. I am sure. I am positive.

7 Q Okay. Okay. Did they talk to you about that this
8 morning?

9 A Yes, sir.

10 Q About that that's Timothy Sunday?

11 A Yes.

12 Q They made sure you understood that?

13 A Yes, sir.

14 Q Who is -- who told you that?

15 A My mom.

16 Q Your mom. She said that --

17 A Mom. She -- she was telling me all about him, and I
18 was listening.

19 Q Okay. So before you came back into court this morning,
20 they made sure you knew who Timmy was?

21 A Yes.

22 Q Okay. They was still telling me -- they were telling
23 me at the table. I was kind of embarrassed.

24 Q Okay. I know. I know it's hard, Cindy. Do you really
25 remember what happened?

Appendix F.
8-21-07

Exh - S - IV / Appendix E

1 A (Shake head.)

2 Q I didn't think so.

3 A No.

4 Q Okay. Is this kind of hard?

5 A No, sir. I am kind of blacking out. I just couldn't
6 remember all of it.

7 Q So people have told you what happened?

8 A Yes.

9 Q Okay. Sometimes that makes it easier to remember--

10 A Uh-huh.

11 Q --if people tell you, doesn't it?

12 A It's hard.

13 Q I know it's hard. Do you need a break?

14 A Yes.

15 Q Would you like a break?

16 A Yes. Yes, sir.

17 Q Okay.

18 MR. TICKAL: Judge, can we give her a
19 little break?

20 MS. MEEK: May we approach before that happens?

21 THE COURT: Mr. Tickal.

22 (Whereupon, a bench discussion was had
23 outside the hearing of the jury.)

24 MS. MEEK: Aren't we about done?

25 THE COURT: Do you have any more questions?